

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PUBLIC EMPLOYEES FOR
ENVIRONMENTAL RESPONSIBILITY,
962 Wayne Ave, Suite 610
Silver Spring, MD 20910

Plaintiff,

v.

U.S. DEPARTMENT OF THE NAVY
1200 Navy Pentagon
Washington, D.C. 20350-1200

Defendant

CIVIL ACTION NO. 19-697

COMPLAINT

PRELIMINARY STATEMENT

1. Plaintiff Public Employees for Environmental Responsibility (“Plaintiff” or “PEER”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, as amended, to compel the United States Department of the Navy (“Defendant,” the “Navy,” or “USN”) to disclose documents requested pursuant to FOIA.
2. Plaintiff is a non-profit organization dedicated to research and public education concerning the activities and operations of federal, state, and local governments.
3. In October 2018, Plaintiff sent two FOIA requests to Defendant seeking records concerning Defendant’s policies regarding per- and polyfluoroalkyl substances (PFAS) and whether they are being followed, the extent of PFAS contamination at Navy facilities, and certain documents related to Defendant’s activities relating to PFAS contamination.

4. To date, Defendant has not made a determination on Plaintiff's FOIA requests, provided any documents responsive to Plaintiff's FOIA requests, or identified which such documents, if any, exist.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action under 5 U.S.C. § 552(a)(4)(B). This Court also has federal question jurisdiction over this action under 28 U.S.C. § 1331.
6. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*
7. This Court is a proper venue under 5 U.S.C. § 552(a)(4)(B) (providing for venue in FOIA cases where the plaintiff resides, or in the District of Columbia).
8. This Court has the authority to award reasonable costs and attorneys' fees under 5 U.S.C. § 552(a)(4)(E).

PARTIES

9. Plaintiff, PEER, is a non-profit public interest organization incorporated in Washington, D.C. and headquartered in Silver Spring, Maryland, with field offices in Florida, Massachusetts, and Tennessee.
10. Among other public interest projects, PEER engages in advocacy, research, education, and litigation relating to the promotion of public understanding and debate concerning key current public policy issues. PEER focuses on the environment, including the regulation and remediation of toxic substances, public lands and natural resource management, public funding of environmental and natural resource agencies, and governmental accountability. PEER educates and informs the public through news releases to the media, through its web site, www.peer.org, and through publication of the *PEER Review* newsletter.

11. Defendant, USN, is an agency of the United States as a “military department” under 5 U.S.C. § 552(f)(1).
12. Defendant is charged with the duty to provide public access to records in its possession consistent with the requirements of the FOIA. The Defendant’s refusal to provide the Plaintiff with the records requested is a violation of the FOIA, a federal law.

STATEMENT OF FACTS

13. Per- and polyfluoroalkyl substances (PFAS) are emerging contaminants of concern that have been found in many areas of the country, especially in water bodies and groundwater. Many former and active military bases are highly contaminated, primarily from prior use of firefighting foams containing PFAS. Drinking water at East Coast military bases has been contaminated, drinking water wells have been shut, and the military is providing alternate drinking water to these communities. PFAS has dual hydrophilic and hydrophobic properties, causing it to spread unusually quickly and far in the environment.
14. Serious concerns exist about extensive PFAS contamination on USN’s current and former California bases and the Navy’s implementation of its policies on this subject. A great number of persons live and work in close proximity to former Navy facilities in Orange County, CA, and their closure and rehabilitation is a first step towards transfer for civilian use. Those people are currently underinformed as to the extent of PFAS contamination in their communities and on properties subject to the Navy’s Base Realignment and Closure (BRAC) process.

PEER’s First FOIA Request

15. On October 23, 2018, Plaintiff requested information via FOIA concerning PFAS contamination at Navy sites. Specifically, PEER requested the following:

1. *Complete copies of the latest PFAS sampling reports issued by the Navy for Navy Base Realignment and Closure (BRAC) sites in California;*
 2. *All correspondence between the Navy BRAC program and public and private water districts and regional Water Boards related to PFAS sampling reports for BRAC sites former Marine Corps Air Station Tustin and former Marine Corps Air Station El Toro for the period January 1, 2014 to present; and*
 3. *Decision documents regarding the Navy's determination not to delineate PFAS plumes at former Marine Corps Air Station Tustin and former Marine Corps Air Station El Toro.*
16. PEER also requested that to the extent that the Navy needed to perform a detailed review, fees be waived because “disclosure of the information is in the public interest . . . and is not primarily in the commercial interest of the requestor.” 5 U.S.C. 552 (a)(4)(A).
17. On October 29, 2018, USN confirmed receipt of PEER’s FOIA Request by email, assigning it the index number DON-NAVY-2019-000699 and informing PEER that its request had been forwarded to the Naval Facilities Engineering Command BRAC Program Management Office.
18. PEER has received no further communications from the Navy concerning this FOIA request or the status of its request for a waiver of fees under 5 U.S.C. § 552 (a)(4)(A).

PEER’s Second FOIA Request

19. On October 30, 2018, Plaintiff requested information via FOIA concerning Defendant’s response to contamination at Navy sites. Specifically, PEER requested “[a]ny Navy Finding of Suitability for Transfer (FOST) produced for either Marine Corps Air Station (MCAS) El Toro and/or MCAS Tustin.”

20. PEER also requested that to the extent that the Navy needed to perform a detailed review, fees be waived because “disclosure of the information is in the public interest . . . and is not primarily in the commercial interest of the requestor.” 5 U.S.C. 552 (a)(4)(A).
21. On October 31, 2018, USN confirmed receipt of PEER’s FOIA Request on October 30 by email, assigning it the index number DON-NAVY-2019-000875 and informing PEER that its request had been forwarded to Naval Facilities Engineering Command Southwest, 1220 Pacific Highway, San Diego, CA 92132-5190.
22. PEER has received no further communications from the Navy concerning this FOIA request or the status of its request for a waiver of fees under 5 U.S.C. § 552 (a)(4)(A).

CAUSE OF ACTION: FREEDOM OF INFORMATION

23. Plaintiff restates and realleges the allegations in the preceding paragraphs as if fully set forth herein.
24. The FOIA requires federal agencies to respond to public requests for records, including files maintained electronically, to increase public understanding of the workings of government and to provide access to government information. FOIA reflects a “profound national commitment to ensuring an open Government” and agencies must “adopt a presumption in favor of disclosure.” Presidential Mem., 74 Fed. Reg. 4683 (Jan. 21, 2009).
25. The FOIA requires agencies to determine within 20 working days after the receipt of any FOIA request whether to comply with the request. 5 U.S.C. § 552(a)(6)(A)(i). Agencies may only extend this time period for an additional 10 working days in “unusual circumstances.” 5 U.S.C. § 552(a)(6)(B)(i). See also 32 C.F.R. § 286.8(c) (Department of Defense FOIA Regulations superseding prior component-level regulations). The FOIA also provides that upon request, agencies are to make records “promptly available.” 5 U.S.C. § 552(a)(3)(A).

First Count: Request DON-NAVY-2019-000699

26. Plaintiff restates and realleges the allegations in the preceding paragraphs as if fully set forth herein.
27. PEER's first FOIA request was received by the Navy on October 29, 2018. A response to PEER's FOIA Request was due by statute twenty working days from that date on November 28, 2018 (counting all weekdays exclusive of Veteran's Day and Thanksgiving).
28. As of this filing, March 12, 2019, Plaintiff has not received any documents responsive to its FOIA request, or any communications from Defendant regarding this request other than the initial confirmation.
29. Administrative remedies are deemed exhausted when an agency fails to comply with the applicable time limits. 5 U.S.C. § 552(a)(6)(C)(i). Having fully exhausted its administrative remedies for its FOIA request, PEER now turns to this Court to enforce the remedies and public access to agency records guaranteed by the FOIA.
30. Defendant's conduct amounts to a denial of the Plaintiff's FOIA request. Defendant is frustrating Plaintiff's efforts to adequately understand and educate the public regarding the environmental state of former MCAS El Toro and MCAS Tustin, and how the Navy is performing its duties with regard to base closures and cleanup of properties for public use.
31. Plaintiff has constructively exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i), and now seeks an order from this Court requiring the Defendant to immediately produce the records sought in Plaintiff's FOIA request, as well as other appropriate relief, including attorneys' fees and costs.
32. Defendant's failure to make a determination on or disclose the documents requested in Plaintiff's FOIA request within the time frame mandated under FOIA is a denial and wrongful

withholding of records in violation of 5 U.S.C. § 552 and DOD regulations promulgated thereunder, 40 C.F.R. part 286.

Second Count: Request DON-NAVY-2019-000875

33. Plaintiff restates and realleges the allegations in the preceding paragraphs as if fully set forth herein.
34. PEER's second FOIA request was received by the Navy on October 30, 2018. A response to PEER's FOIA Request was due by statute twenty working days from that date on November 29, 2018 (counting all weekdays exclusive of Veteran's Day and Thanksgiving).
35. As of this filing, March 12, 2019, Plaintiff has not received any documents responsive to its FOIA request, or any communications from Defendant regarding this request other than the initial confirmation.
36. Administrative remedies are deemed exhausted when an agency fails to comply with the applicable time limits. 5 U.S.C. § 552(a)(6)(C)(i). Having fully exhausted its administrative remedies for its FOIA request, PEER now turns to this Court to enforce the remedies and public access to agency records guaranteed by the FOIA.
37. Defendant's conduct amounts to a denial of the Plaintiff's FOIA request. Defendant is frustrating Plaintiff's efforts to adequately understand and educate the public regarding the environmental state of former MCAS El Toro and MCAS Tustin, and how the Navy is performing its duties with regard to base closures and cleanup of properties for public use.
38. Plaintiff has constructively exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i), and now seeks an order from this Court requiring the Defendant to immediately produce the records sought in Plaintiff's FOIA request, as well as other appropriate relief, including attorneys' fees and costs.

Defendant's failure to make a determination on or disclose the documents requested in Plaintiff's FOIA request within the time frame mandated under FOIA is a denial and wrongful withholding of records in violation of 5 U.S.C. § 552 and DOD regulations promulgated thereunder, 40 C.F.R. part 286.

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Court:

- i. Enter an order declaring that Defendant wrongfully withheld requested agency documents;
- ii. Issue a permanent injunction directing Defendant to disclose to Plaintiff all wrongfully withheld documents;
- iii. Maintain jurisdiction over this action until Defendant is in compliance with the FOIA, the Administrative Procedure Act, and every order of this Court;
- iv. Award Plaintiff attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E); and
- v. Grant such additional and further relief to which Plaintiff may be entitled.

Respectfully submitted on March 12, 2019,

/s/ Paula Dinerstein
Paula Dinerstein, DC Bar # 333971
Public Employees for Environmental Responsibility
962 Wayne Ave, Suite 610
Silver Spring, MD 20910
(202) 265-7337
pdinerstein@peer.org

Counsel for Plaintiff